

ALTERNATIVE ACCOMMODATION OF AN UNLAWFUL OCCUPIER'S CHOOSING: SOME REFLECTIONS ON

Grobler v Phillips [2022] ZACC 32*

1 Introduction

An abundance of case law dealing with eviction has emerged (see for e.g., *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 (2) SA 337 (CC); *Molusi v Voges NO* 2016 (3) SA 370 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet NO* 2017 (5) SA 346 (CC); *Snyders v De Jager* 2017 (3) SA 545 (CC); *Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC)). Clear rules for evictions exist in the eviction context and a solid body of law is being developed in this regard (see generally, Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD dissertation, Stellenbosch University) 2011 103–146; Pienaar *Land Reform* (2014) 659–811; Cloete *A Critical Analysis of the Approach of the Courts in the Application of Eviction Remedies in the Pre-Constitutional and Constitutional Context* (LLM thesis, Stellenbosch University) 2016 74–142; Viljoen *The Law of Landlord and Tenant* (2016) 361–378; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 499–500). For many years, little attention was given to the issue of unlawful occupiers refusing to be evicted based on preferences or wishes to remain

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in the same house or land under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). However, in recent years disputes around the choice of alternative accommodation in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) have increased significantly.

For instance, the Constitutional Court in *Snyders v De Jager* (*supra*) dealt with the position of Mr Willem Breda who was employed by Stassen Farm and lived in a house on the farm that was previously occupied by Mr Snyders and his family. The Constitutional Court found that the right to “reside on” that was enjoyed by Mr Breda and his family was not tied to the specific house they lived in (*Snyders v De Jager supra* par 78). In another case, *Oranje v Rouxlandia Investments (Pty) Ltd* (2019 (3) SA 108 (SCA)), the Supreme Court of Appeal dealt with the position of Mr Oranje who was employed as a manager at Rouxlandia Investments (Pty) Ltd and was entitled to live in the manager’s house. Mr Oranje’s employment on the farm was terminated because he was medically unfit to work, but he continued to reside in the house (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 5). The private landowner wanted to relocate Mr Oranje to a smaller house than the manager’s house in which Mr Oranje resided (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 20). The Supreme Court of Appeal held that ESTA was not enacted to provide security of tenure to Mr Oranje in the house of his choice (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21). It should be mentioned that despite ESTA being aimed at protecting lawful occupiers and that its provisions are different from those of PIE, there is no basis to argue that the principles laid down in *Snyders* and *Oranje* are not applicable to PIE cases to the extent that both pieces of legislation are enacted to prevent unfair evictions (*Grobler v Phillips* [2022] ZACC 32 par 36).

The Constitutional Court in *Grobler v Phillips* ([2022] ZACC 32) had to decide whether it was just and equitable in terms of section 4(7) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) to grant an order instructing Mrs Phillips and her son, who has a physical disability, to vacate their current home. This judgment is important, not only because it showed that an unlawful occupier such as Mrs Phillips does not have the right to refuse to be evicted on the basis that she prefers or wishes to remain in the same property that she is occupying unlawfully, but it is also important because the judgment provides clarity on whether private landowners are obliged to provide unlawful occupiers with alternative accommodation of their choosing. The purpose of section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) played a significant role in the determination of whether private landowners have an obligation to provide alternative accommodation to unlawful occupiers. The Constitutional Court indicated that section 26 of the Constitution does not give Mrs Phillips the right to choose exactly where she wants to reside (par 36). According to the Constitutional Court, where an offer of alternative accommodation is made by a private landowner, such an offer should not be construed as authority regarding what other private landowners are obliged to do in similar circumstances (par 48).

This brings us to the subject matter of this case note – namely, alternative accommodation of an unlawful occupier's choosing under PIE. The pertinent question is whether private landowners are obliged to provide unlawful occupiers with suitable alternative accommodation of their own choosing. To answer this question satisfactorily, the first part of the case note discusses the meaning of access to adequate housing (as set out in s 26(1) of the Constitution). The second part of the case note analyses and evaluates the recent case of *Grobler v Phillips (supra)* in light of the question whether private landowners could be obliged to provide unlawful occupiers under PIE with suitable alternative accommodation of the unlawful occupier's own choosing. The assessment includes reasons why it may not be appropriate to compel private landowners to provide unlawful occupiers with alternative accommodation that the unlawful occupiers desire or prefer.

2 Conceptualising adequate housing for unlawful occupiers

In terms of section 26(1) of the Constitution, everyone (including unlawful occupiers) has the right of access to adequate housing. However, section 26(1) of the Constitution does not define the meaning of adequate housing. Interestingly, the Constitutional Court in *Government of the Republic of South Africa v Grootboom (supra)* has observed that what constitutes adequate housing depends on a particular context (*Government of the Republic of South Africa v Grootboom supra* par 37). This is because some occupiers may require access to land, housing or services (*Government of the Republic of South Africa v Grootboom supra* par 37). The Constitutional Court in *Grootboom* has had an opportunity, with reference to international law, to shed light on what constitutes access to adequate housing (*Government of the Republic of South Africa v Grootboom supra* par 26–33). Section 39 of the Constitution obliges a court to consider international law as an interpretative guide to the Bill of Rights (s 39(1)(b) of the Constitution; see further, *Government of the Republic of South Africa v Grootboom supra* par 26; *S v Makwanyane* 1995 (3) SA 391 (CC) par 35; Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* (LLM thesis, Stellenbosch University) 2010 5 and 13–37). The court's reference to the contextual nature of the term "adequate housing" resembles what the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has proposed on the meaning of adequate housing. According to the CESCR, housing would be considered adequate if it is habitable, and if it provides its inhabitants with adequate space, protection from the elements such as cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, and if the physical safety of the inhabitants is ensured (CESCR *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, 13 December 1991, E/1992/23 par 8(d)). This statement means that the right of access to adequate housing implies habitability. It should be pointed out that an interpretation of habitability should include the list of descriptors that came after the descriptor of habitability to encompass what is meant by habitability, meaning that those descriptors are not

separate from and stand-alone concepts but that they form part of the concept of habitability.

The CESCR has also observed that housing is adequate if it contains certain facilities that are necessary for health, security, comfort, and nutrition such as safe drinking water, electricity or gas for cooking and lighting, facilities for washing, bathing and sanitation, storage for food and regular refuse and sewage removal (CESCR *General Comment No 4* par 8(b)). This statement suggests that adequate housing must include access to basic services such as water and electricity. In the final instance, the CESCR point out that housing is adequate if it is in a location that is close to the unlawful occupier's place of employment and not far away from social amenities such as schools, clinics, and shopping centres (CESCR *General Comment No 4* par 8(f)). The CESCR point of view implies that location is an integral part of adequate housing. However, in South African law, the statement cannot mean that unlawful occupiers have a right to adequate housing at the vicinity of the unlawful occupiers' own choosing (in this context, remaining in the same house at the same demarcated area or preferred spot or location where the unlawful occupier resided since they moved onto the land) (*City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) par 44 and 75; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). This is the position since the issue of remaining in the same house or preferred spot or location for eviction is determined by considering a number of factors, such as the availability of land on the preferred site (*Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). In view of the location being a contextual factor to consider in South African law, the private landowner, who in certain circumstances could provide adequate housing or alternative housing to unlawful occupiers under PIE must, prior to the eviction, consider the inter-connectedness between the location of housing to be inhabited by unlawful occupiers and the unlawful occupiers' place of work and access to social amenities like schools and clinics (*City of Johannesburg v Rand Properties (Pty) Ltd supra* par 44; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 254). It is important to mention here that if a private landowner offers alternative accommodation to unlawful occupiers, that should not be taken as being a blanket application to what other private landowners are obliged to do in certain circumstances (*Grobler v Phillips supra* par 38 and 48). Therefore, the obligation to provide adequate housing or alternative accommodation to unlawful occupiers rests primarily with the State (s 26(2) of the Constitution; *Government of the Republic of South Africa v Grootboom supra* par 82; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 17; *Grobler v Phillips supra* par 37). As such, housing that is built on polluted sites or close to sources that cause pollution are likely to be classified as inadequate (CESCR *General Comment No 4* par 8(f)). This is because such an environment may impact on the unlawful occupiers' rights to health (see s 27 of the Constitution) and a healthy environment (see s 24 of the Constitution). This means that adequate housing in South African law must, at the very least, be in a location that is

not dangerous to the unlawful occupiers' health and safety, and not impair their human dignity (CESCR *General Comment No 4* par 8(f); *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 36; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg supra* par 44; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) par 108).

Thus, when unlawful occupiers are evicted under PIE, the right to have access to adequate housing, which includes suitable alternative accommodation, may be implicated (*Grobler v Phillips supra* par 36–37). The Constitutional Court has observed in *Government of the Republic of South Africa v Grootboom (supra)*, that it is not only the right of access to adequate housing that may be at stake when unlawful occupiers are evicted (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) par 21). Whenever unlawful occupiers approach a court asserting that their socio-economic rights have been infringed, the right to human dignity may also be implicated (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 21). This means that any claim based on socio-economic rights must essentially engage the right to human dignity (*Government of the Republic of South Africa v Grootboom supra* par 83; *Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 21).

Section 26(3) of the Constitution protects unlawful occupiers against conduct that may cause them to be removed from their homes without prior engagement (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 139, 230 and 237). In this regard, the historical context of forced removals requires genuine engagement. Section 26 of the Constitution was enacted as a vehicle to facilitate a move away from the past by emphasising the significance of having access to adequate housing in our new constitutional dispensation (*Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 29, referred to in *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 30). Furthermore, it was enshrined in the Constitution to rectify the indignity that was suffered by unlawful occupiers because the alternative accommodation offered was inadequate and could not provide the unlawful occupiers with access to adequate housing and human dignity (*Jaftha v Schoeman, Van Rooyen v Stoltz supra* par 29; cited in *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 30). As unlawful occupiers were previously not protected in terms of the common law from forced removals, section 26(3) of the Constitution, through the provisions of PIE, now aims to protect unlawful occupiers from forced removals (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 12). The discussion on the meaning of adequate housing under section 26 has shown that adequate housing is more than just a roof over one's head. It is for this reason that the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers (supra* par 17) once remarked that the constitutional provision guaranteeing the right to adequate housing:

“evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only

relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world.”

The right of access to adequate housing is fulfilled if a minimum standard that unlawful occupiers should enjoy is met in the form of protection from the elements, such as cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors and physical safety and privacy of the unlawful occupier must be guaranteed. This part of the note has explained the meaning of adequate housing flowing from section 26 of the Constitution. The part that follows analyses the case of *Grobler v Phillips* (*supra*). The difference in terminology between section 26 (adequate housing) and PIE (suitable alternative accommodation/housing) is that the former is a constitutional right, while the latter is a right conferred upon unlawful occupiers by PIE. It should be mentioned that a claimant relying directly on section 26 may be provided with suitable alternative accommodation, as section 26 includes an entitlement to suitable alternative housing. In light of the *Grobler v Phillips* case, this analysis is important in showing that unlawful occupiers are not entitled to the alternative accommodation they desire or prefer.

3 Alternative accommodation of an unlawful occupier’s choice in *Grobler v Phillips*

3.1 Facts of *Grobler v Phillips*

The applicant was Mr Grobler, a businessman and private landowner who resided at 21 Aberdeen Street, Somerset West, Western Cape Province. The first respondent was Mrs Phillips aged 85 years. Mrs Phillips had resided on the property since she was 11 years old. Mrs Phillips started residing on the property in 1947 when the property had formed part of a larger farm. Mr Grobler bought the property at a public auction because he wanted his old parents to reside on it (par 2). After Mr Grobler had bought the property, he met with Mrs Phillips three times and informed her that he required her to vacate the property. During the meetings, Mr Grobler proposed to Mrs Phillips that he was willing to pay a certain amount towards her relocation or provide Mrs Phillips, at his own expense, with alternative accommodation. Mrs Phillips rejected Mr Grobler’s proposals. Mrs Phillips refused to move out of the property (par 4). Mr Grobler’s attorneys then requested Mrs Phillips in writing to vacate the property. Mrs Phillips refused to leave the property and alleged that she enjoyed an oral right of *habitatio*, which was granted by a previous private landowner and enforceable against Mr Grobler. The right of *habitatio* is a limited real right, which confers on the holder the right to dwell on a property belonging to another, without any detriment to the substance of the property (see *Hendricks v Hendricks* 2016 (1) SA 511 (SCA) par 6; Muller *et al Silberberg and Schoeman’s The Law of Property* 387; Van der Walt *The Law of Servitudes* (2016) 492; Pope, Du Plessis, Badenhorst, Freedman, Mostert, Pienaar and Van Wyk *The Principles of the Law of Property in South Africa* 2ed (2020) 258). Mr Grobler’s attorneys made another offer to Mrs Phillips in writing, that Mr

Grobler would at his own expense make available to her a two-bedroom flat where she could reside for the rest of her life. Mrs Phillips also rejected this offer. Mr Grobler's attorneys made the same offer to Mrs Phillips in writing, but she rejected the offer again (par 5). Mr Grobler then approached the Somerset West magistrates' court for relief.

3.2 *The magistrates' court decision*

Relying on PIE, Mr Grobler applied for Mrs Phillips's eviction and alleged that she was an unlawful occupier on his property. The application was opposed by Mrs Phillips on the basis that she had an oral right of *habitatio*, which she alleged had been given to her by previous owners. Mrs Phillips also alleged that she was protected in terms of PIE, and that an eviction order should not be granted (par 6). The magistrates' court rejected Mrs Phillips's defence based on the alleged right of *habitatio*. The magistrates' court held that Mr Grobler had proved his right of ownership over the property. The magistrates' court found that the alleged right of life-long *habitatio* was invalid and unenforceable against Mr Grobler as it was not registered against the property's title deed. The magistrates' court pointed out that the only right Mrs Phillips had in respect of the property was the right of occupancy which, according to the magistrates' court, could not be equated to a right of *habitatio* or a usufruct. The magistrates' court further held that at the time of the proceedings, Mrs Phillips no longer had Mr Grobler's consent to occupy the property and had no right in law to occupy it. The magistrates' court granted an order of eviction against Mrs Phillips. The eviction date was not considered immediately by the magistrates' court and the matter was thus postponed to consider an appropriate eviction date (par 7). Prior to the postponement of the matter, Mr Grobler's attorneys informed the magistrates' court that despite Mrs Phillips's attorney expressed intention to apply for leave to appeal against the eviction order, Mr Grobler was willing at his own expense to assist Mrs Phillips with her relocation. Mr Grobler's attorneys further informed the magistrates' court that Mr Grobler was willing to allow Mrs Phillips to continue to stay on the property for another two months until she was relocated. Mr Grobler's attorneys further mentioned that Mr Grobler would bear the expenses relating to the accommodation in a retirement centre for a period of 12 months (par 8). Mrs Phillips also rejected this offer. The magistrates' court heard evidence on whether alternative accommodation for Mrs Phillips was available. The magistrates' court was addressed on Mrs Phillips's personal circumstances, including her age and the duration of her residence on the property. After considering all the relevant factors, the magistrates' court ordered Mrs Phillips to leave the property (par 9). Mrs Phillips appealed this decision to the full court of the Western Cape Division of the High Court.

3.3 *The High Court decision*

In the High Court, Mrs Phillips invoked the provisions of PIE and relied on a new ground of appeal. This ground was that Mrs Phillips was an occupier in terms of ESTA. The appeal was upheld by the High Court. The High Court

pointed out that a change of Mrs Phillips's status from that of a "lawful occupier" to an "unlawful occupier" could not be achieved without giving her reasonable notice to terminate the right to occupy the property. The High Court held that the notice of termination of occupation given to Mrs Phillips was too short and thus unreasonable. The High Court found that Mr Grobler should not have launched the eviction proceedings prior to considering Mrs Phillips's rights and whether she was in fact an unlawful occupier. The High Court further mentioned that Mr Grobler had failed to show that Mrs Phillips was an unlawful occupier in terms of PIE. Regarding Mrs Phillips's reliance on ESTA, the High Court found that the property only ceased to be a farm in 2001 and ESTA was thus applicable. This meant that Mrs Phillips was protected in terms of ESTA (par 10–11). Mr Grobler appealed this decision to the Supreme Court of Appeal.

3.4 *The Supreme Court of Appeal decision*

There were three issues for determination at the Supreme Court of Appeal. The first issue was whether it was appropriate for the High Court to allow Mrs Phillips to raise a new ground on appeal, that she was also protected by ESTA. The second issue was whether Mr Grobler had established that Mrs Phillips was an unlawful occupier under PIE. The third issue related to the exercise of the High Court's discretion not to order the eviction because such an order would not be just and equitable (par 12).

The Supreme Court of Appeal pointed out that the application before the magistrates' court was started on the basis that PIE was applicable. According to the Supreme Court of Appeal, the magistrates' court seemed not convinced that there was an express agreement between the parties that ESTA did not apply. In this regard, the magistrates' court reasoned that the dispute between the parties was whether Mrs Phillips was an unlawful occupier (par 13). Regarding Mrs Phillips's reliance on ESTA, the Supreme Court of Appeal found that the property was converted from agricultural land into a township by no later than 1991 when its status as an erf was registered in the deeds register. The Supreme Court of Appeal concluded that section 2(1)(b) of ESTA did not apply. This meant that the High Court erred in finding that Mr Grobler did not discharge the onus of establishing that ESTA did not apply (par 14). The Supreme Court of Appeal considered the finding of the High Court that Mrs Phillips was not an unlawful occupier. The Supreme Court of Appeal found that Mr Grobler clearly showed his intention to terminate Mrs Phillips's right to occupy the property and to withdraw his consent for her continued occupation. The Supreme Court of Appeal held that Mr Grobler had proved that Mrs Phillips was an unlawful occupier (par 16). The Supreme Court of Appeal also considered the alleged oral right of *habitatio*. It found that the alleged right of *habitatio* had not been in writing nor registered against the title deed and could not be enforceable against successive owners (par 17).

The Supreme Court of Appeal went on to decide whether it was just and equitable to grant an eviction order. The Supreme Court of Appeal found that there were certain factors to be taken into account by the High Court in exercising its discretion, namely: (a) Mrs Phillips had been in occupation of

the property since she was 11 years old; (b) Mrs Phillips was 84 years at the time the matter was heard at the Supreme Court of Appeal; and (c) during Mrs Phillips's occupation of the property, it had formed part of a farm and gradually became part of an urban development. According to the Supreme Court of Appeal, Mrs Phillips could have been protected under ESTA if it had not been for the urban development (par 19). The Supreme Court of Appeal found that Mr Grobler as property owner was not entitled to obtain an order of eviction. This is because in terms of PIE a private landowner's right may, in certain circumstances, be limited and the right of vulnerable persons to housing upheld (on the fact that ownership is not absolute, see generally Dhlwayo *A Constitutional Analysis of Access Rights That Limit Landowners' Right to Exclude* (LLD dissertation, Stellenbosch University) 2015 79–102 and 136; Van der Walt and Dhlwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" 2017 134 *South African Law Journal* 34 34–52; Van der Walt "Sharing Servitudes" 2015 *European Property Law Journal* 162 200). The Supreme Court of Appeal then concluded that there was no basis to interfere with the discretion exercised by the High Court and agreed that it was not just and equitable to order an eviction in the matter. Mr Grobler approached the Constitutional Court for relief.

3.5 *The Constitutional Court judgment*

Two of the issues that were considered by the Constitutional Court related to the exercise of the magistrates' court discretion and whether it was just and equitable to grant an order of eviction. The Constitutional Court found that the discretion was that of the trial court and not the High Court as a court of appeal. According to the Constitutional Court, the High Court could have been entitled to exercise a discretion if it had interfered with the exercise of discretion by the magistrates' court (par 31). In deciding whether it was just and equitable to grant an order of eviction, the Constitutional Court began by pointing out that a court must consider all the relevant circumstances. The circumstances include, except where the land was sold in a sale in execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another private landowner for the relocation of the unlawful occupiers. The relevant circumstances also entail taking into consideration the rights and needs of the elderly, children, disabled persons, and households headed by women (par 33). In this case, the relevant factors in terms of section 4(7) of PIE included, namely (a) Mrs Phillips's age; (b) that Mrs Phillips resided on the property with her disabled son; (c) that Mrs Phillips could have been protected by ESTA if the farm had not become part of an urban development; (d) Mrs Phillips's wishes regarding the offers of alternative accommodation; and (e) that Mrs Phillips was accustomed to life in the current house and enjoyed the freedom, space, and environment around it (par 34). The Constitutional Court went on to cite two judgments as authority for its view that an unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted because she prefers or wishes to remain in the property that she presently occupies unlawfully. This is because section 26 of the Constitution does not give Mrs Phillips the right to choose exactly

where in Somerset West she wants to live (see par 35–36; *Snyders v De Jager supra* par 78; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21). As already mentioned, the Constitutional Court rightfully confirmed that an unlawful occupier's right to adequate housing does not include housing in the vicinity of the unlawful occupier's own preference (in this context, remaining in the same house for Mrs Phillips because she was accustomed to the freedom, space, and environment that the house offered) (par 34, 36 and 42).

The Constitutional Court considered a secondary question on who bears the obligation to provide alternative accommodation. The Constitutional Court held that, in terms of section 4(7) of PIE, such an obligation rests on the State and its organs. This obligation is further reinforced by section 26(2) of the Constitution, which places a positive obligation on the State to realise the right of access to adequate housing. Relying on the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2012 (2) SA 104 (CC) par 31), the Constitutional Court reaffirmed that a private landowner has no obligation to house unlawful occupiers for free. The obligation to house unlawful occupiers rests solely on the State in terms of section 26(2) of the Constitution (par 37 and 48). The Constitutional Court accepted that the capacity of a private landowner to provide alternative accommodation and the peculiar circumstances of an evictee may be relevant in determining whether an eviction order is just and equitable. However, the Constitutional Court held that in cases like this, where Mr Grobler has repeatedly offered Mrs Phillips alternative accommodation, such an offer should not be taken as creating any obligation on Mr Grobler to provide alternative accommodation (par 38). This is because an offer of alternative accommodation is not a precondition for the granting of an eviction order, but one of the factors to be considered by a court (see *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) par 769). It should be pointed out that an eviction order in instances where there is no provision of alternative accommodation is likely not to be as just and equitable as where provision of alternative accommodation is offered (see *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) par 15).

Owing to the tensions that arise when occupiers are evicted, the Constitutional Court mentioned that justice and equity considerations require that the rights and/or interests of the parties to the eviction proceedings be balanced and reconciled (par 39; *Port Elizabeth Municipality v Various Occupiers supra* par 23; *Hattingh v Juta* 2013 (3) SA 275 (CC) par 32). This means that when balancing the rights and/or interests of the parties, compromises may have to be made by both parties to reach a just and equitable outcome (par 40). In this case, the Constitutional Court observed that no effort had been made by Mrs Phillips to accept the various offers of alternative accommodation made by Mr Grobler, which was counter-productive to reaching that compromise (par 40–41). If these offers had been accepted by Mrs Phillips, she would have continued to enjoy a decent home. Consequently, it is here where a just and equitable order should not be construed to mean that the rights and/or interests of the unlawful occupier are given preference over those of private landowners. Furthermore, a just

and equitable order should not be taken to mean that the wishes or personal preferences of an unlawful occupier are of any relevance in the balancing enquiry (par 44). What is important in the circumstances is the consideration that an eviction order does not render Mrs Phillips homeless. Since Mr Grobler's offer of alternative accommodation was still available, the Constitutional Court made it an order of court (par 49). This would essentially mean that Mrs Phillips could only be required to relocate from one house to another in the same immediate community within Somerset West. In this regard, the order would not have the effect of relocating Mrs Phillips to a different community that she does not know. The Constitutional Court found such an order to be just and equitable (par 46). The Constitutional Court then instructed Mr Grobler to purchase a two-bedroom dwelling in a good condition for Mrs Phillips. The Constitutional Court held that the dwelling must comply with the following requirements; (a) it must have at least two bedrooms; (b) it must have a lounge, kitchen and a bathroom; (c) the dwelling must be situated within Somerset West; and (d) regard must be had to Mrs Phillips's age and her son's disability and the dwelling should be easily accessible (par 49). The Constitutional Court concluded by holding that this generous offer should not be construed as setting a precedent on what other private landowners may be obliged to do in similar circumstances (par 48).

3 6 *Some reflections on Grobler v Phillips*

3 6 1 Alternative accommodation that the unlawful occupiers desire or prefer

As mentioned above, alternative accommodation is not a precondition for the granting of an eviction order, but one of the factors to be considered by a court (*Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter supra* par 769). However, if suitable alternative accommodation is not provided on the site where unlawful occupiers are to be evicted, it might not be just and equitable for a court to grant an eviction order (*City of Johannesburg v Changing Tides supra* par 15). Coupled to whether it is just and equitable to provide alternative accommodation to unlawful occupiers is the question whether private landowners are obliged or compelled to provide unlawful occupiers with the suitable alternative accommodation that they desire or prefer. As already mentioned, it should be noted that section 26 of the Constitution was enshrined to provide unlawful occupiers with access to adequate housing, which does not mean to include a preferred house of choice (*Grobler v Phillips supra* par 36). The purpose of section 26 of the Constitution is to promote and guarantee everyone access to adequate housing and provide occupiers with rights protecting their homes (Liebenberg "Housing" in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 334). Khoza points out that the purpose of section 26(1) of the Constitution is to give people access to housing, basic needs and services that are important for occupants to lead a dignified life (Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 20). Thus, the need to promote access to

adequate housing to occupiers living on land belonging to another is recognised in section 26 of the Constitution. In terms of the purpose of section 26 of the Constitution, private landowners are not obliged to provide unlawful occupiers with suitable alternative accommodation of their own choice. Rather, private landowners may within their available resources provide unlawful occupiers with suitable alternative accommodation that, at the very least, is fit for human habitation as held in the *Grobler v Phillips* case. Furthermore, such provision of suitable alternative accommodation must not be seen as imposing an obligation on what other private landowners are obliged to do in similar circumstances, as indicated in *Grobler v Phillips*. This is because the law protects not only the rights of unlawful occupiers, but also recognises the rights of private landowners to apply for the eviction of unlawful occupiers under certain conditions and circumstances, while balancing the rights of private landowners and unlawful occupiers (*Grobler v Phillips supra* par 39–41).

Consequently, private landowners may not move unlawful occupiers to uninhabitable dwellings (for the meaning of what constitutes a habitable dwelling, see specifically Ngwenyama *A Common Standard of Habitability? A Comparison between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2020 121–144) that could offend unlawful occupiers' right to live in accordance with basic human dignity (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17). In the same way, when unlawful occupiers are fairly and legally evicted, they should not unreasonably delay their eviction by insisting on remaining in the same accommodation that they desire or prefer to live in, as held in *Grobler v Phillips*. If the alternative accommodation is unsuitable for human habitation and impacts on the unlawful occupiers' right of access to adequate and other fundamental rights such as human dignity, unlawful occupiers can resist such an eviction because the house impairs their right to live in dignity (compare *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17). The protection afforded by section 10 of the Constitution, on which unlawful occupiers could rely to resist their eviction, is to ensure that unlawful occupiers are not subjected to conditions that are inhumane and that infringe on their human dignity (*Daniels v Scribante* 2017 4 SA 341 (CC) par 31–32; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18; Van der Sijde "Tenure Security for ESTA Occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*" 2020 36 *South African Journal on Human Rights* 1 5 and 9–11). It should be noted that the protective measures in section 10 of the Constitution do not amount to a blanket resistance to an eviction under all circumstances, but in instances where the state of disrepair of the house implicates constitutional rights (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18). While it is clear that private landowners cannot be compelled to provide unlawful occupiers with the alternative accommodation they desire or prefer, the discussion that follows provides the specific reasons for such an approach.

3 6 2 Justifications for a non-preference approach

Private landowners may not be compelled to provide unlawful occupiers in terms of section 26 with suitable alternative accommodation of the unlawful occupiers' own choosing, because the primary purpose of section 26 of the Constitution was not to provide unlawful occupiers with housing of their own choosing. However, section 26 of the Constitution was enshrined to ensure that everyone gains access to at least adequate housing as part of the transformative mandate of the Constitution.

Another reason for not compelling private landowners to provide unlawful occupiers with suitable alternative accommodation of the unlawful occupiers' choosing, would be that suitable alternative accommodation is provided by the private landowner to unlawful occupiers within his or her available resources, as in the case of *Grobler v Phillips*. It would be unreasonable, therefore, to require private landowners, who fund themselves from their own pockets, to provide unlawful occupiers with suitable alternative accommodation of their own choosing (*Daniels v Scribante supra* par 40; Currie & De Waal *The Bill of Rights Handbook* 6ed (2013) 50).

Moreover, private landowners should not be compelled to provide unlawful occupiers with suitable alternative accommodation of their own choosing, because such a position would be prejudicial to the right of private landowners to apply for an eviction order that is permitted by PIE, and while alternative accommodation is not a precondition for the granting of an eviction order. In this regard, the courts should strike a proper balance between the rights and/or interests of unlawful occupiers and private landowners, as indicated in *Grobler v Phillips*. If the private landowner has offered to provide suitable alternative accommodation that is safe and not less favourable to the unlawful occupiers' previous circumstances, an eviction order should be granted, as the unlawful occupiers will not be prejudiced (see *Grobler v Phillips supra*).

It would also not be appropriate to compel private landowners to provide unlawful occupiers with suitable alternative accommodation of the occupiers' own choosing, because occupiers and private landowners are arguably not best placed to decide which accommodation is suitable. Although it is the private landowner's property and they should provide the accommodation, and the unlawful occupiers are obviously familiar with the property and its set-up, what is suitable to the private landowner may arguably not be suitable in the eyes of the unlawful occupier (such as Mrs Phillips). In such circumstances, a court is better positioned than the unlawful occupiers and private landowners to reach an objective, principled decision on what constitutes suitable alternative accommodation. This is why, for example, an *in loco* inspection may be conducted by the court to ensure that the offered accommodation is available and conducive to human habitation. An inspection should also be conducted to ensure that the relocation of unlawful occupiers is feasible and executable, so that unlawful occupiers are not rendered homeless. The justifications for a non-preference approach are essentially based on the fact that section 26 of the Constitution was not enshrined to give unlawful occupiers preference with regard to alternative

housing when they are evicted. It is also not justifiable for unlawful occupiers to choose their own alternative housing because if so permitted, it could become unreasonable for private landowners to provide it, especially in light of the limited resources at their disposal.

In the *Grobler v Phillips* case, the Constitutional Court confirmed the procedural and substantive requirements for evictions in terms of PIE. These requirements require that private landowners and unlawful occupiers work together and where necessary compromise to reach a mutually acceptable outcome. If no compromise is reached, as in *Grobler v Phillips*, the court can be approached to have the matter resolved. Where the court is approached, the case of *Grobler v Phillips* clearly indicates that the court's involvement can be extensive and hands-on. This may include the court acknowledging the various offers of alternative accommodation provided by the private landowner and thus pronouncing that it is just and equitable to grant an eviction order. Given the preferences that can be raised by unlawful occupiers about suitable alternative accommodation and the obvious practicalities and costs with requiring the court to be involved, it is suggested that unlawful occupiers should accept an offer of alternative accommodation by the private landowner in a bid to reach a compromise.

4 Conclusion

Section 26 of the Constitution provides everyone with the right to have access to housing that is adequate. Housing is considered adequate if, among other factors, it is within the vicinity of social amenities such as workplaces, schools, clinics and shopping centres. However, this statement should not be construed to mean that unlawful occupiers have a right to adequate housing of their own choosing – for instance, an occupier wishing to live at a preferred house or on certain land because they are accustomed to the life, space, and environment it offers. As such, unlawful occupiers do not have a right to refuse an eviction because they wish or prefer to remain in the same house or land. Unlawful occupiers can only resist an eviction based on the unsuitability of the alternative house or land and not based on preference, as held in *Grobler v Phillips*. An offer of alternative accommodation is not a prerequisite for an eviction order, but one of the factors to be considered before an eviction order is granted. The obligation to provide unlawful occupiers with alternative accommodation rests solely on the State in terms of section 26(2) of the Constitution. There is no obligation on private landowners to provide alternative accommodation to unlawful occupiers. This is because section 26 of the Constitution was not enshrined to give unlawful occupiers the right to choose exactly where their alternative accommodation should be located when they are evicted. It is also not justifiable for unlawful occupiers to choose their own alternative accommodation because it could be unreasonable for private landowners to provide such preferred accommodation, especially in light of limited resources at their disposal. Thus, where a private landowner offers alternative accommodation to an unlawful occupier, such an offer should not

be construed as a precedent for what other private landowners may be required to do in similar circumstances.

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